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No. 96-802

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In The

Supreme Court of the United States

October Term, 1996

LISA ANNE VARNER,

Respondent,

vs.

NATIONAL SUPER MARKETS, INC.,

Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Citations	iii
Statement of the Case	1
A. Procedural Background	1
Statement of the Facts	1
A. Reports of Harassment	1
B. The Collective Bargaining Agreements	3
C. The Sexual Harassment Policy	4
Reasons for Denying the Writ	5
I. This Court Should Not Issue This Writ Because Any Decision on the Federal Law Questions Will Have No Impact on the Judgment of the District Court, and This Court Has Recently Declined to Entertain the Same Issues Raised by National in Another Petition.	5
II. The Language and History of the Civil Rights Acts of 1964 (as amended) and 1991 Do Not Mandate Exhaustion of Either the Grievance and Arbitration Procedures of a Collective Bargaining Agreement or an Employer's Internal Grievance Procedure.	7

Contents

Page

III. Twenty Years of Supreme Court Precedent Holds that a Claimant Is Not Required to Grieve and Arbitrate Her Title VII Claim Pursuant to a Collective Bargaining Agreement. 9

IV. National's Alleged Conflict Between the Eighth and the Fourth Circuit is Nonexistent Because the *Austin* Decision Erroneously Applied Supreme Court Precedent and Because There Are Significant Factual Differences Between the Collective Bargaining Agreements at Issue in Each Case Which Support the Conclusions Reached by the Respective Courts. 12

V. This Court Need Not Clarify Its Decision in *Meritor v. Vinson* as National Was Allowed to Introduce Evidence and Argue Its Position at the Trial Court, and National's Petition Merely Raises a Sufficiency of the Evidence Argument. 17

VI. National Suggests There Is a Conflict Between the Eighth Circuit's Opinion in This Case and the Third Circuit's Opinion in *Bouton v. BMW of North America, Inc.;* However, the Only "Conflict" Is the Outcome in Each Case Which Is Due to the Differences in the Facts of Each Case. 19

VII. National Suggests that Various Courts Have Interpreted *Meritor* Differently and Therefore, This Court Should Clarify the Holding in *Meritor;* However, Review of Each of the Cases Cited by

Contents

Page

National Reveals that the Courts Did Not Interpret *Meritor* Differently But Rather the Outcome Differed Because of the Application of *Meritor* to the Specific Facts of Each Case. 20

Conclusion 23

TABLE OF CITATIONS

Cases Cited:

Alexander v. Gardner-Denver Company, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974) 9, 10, 11, 13, 15, 16

Atchison, Topeka and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987) 10, 11

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996) 6, 12, 14, 15, 17

Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981) 10, 11

Bouton v. BMW of North America, Inc., 29 F.3d 103 (3rd Cir. 1994) 19, 20

EEOC v. Board of Governors, 957 F.2d 424 (7th Cir. 1992) 10

Contents

Page

Equal Opportunity Commission v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) 21, 22

Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995) 20, 21, 22

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) 10, 12, 13

Green v. City of St. Louis, 870 S.W. 2d 794 (Mo. banc 1994) 6

Jansen v. Packaging Company of America, 895 F. Supp. 1053 (N.D. Ill. 1995) 21, 22

Livadas v. Bradshaw, __ U.S. __, 114 S. Ct. 2068 (1994) 10, 11

McDonald v. City of West Branch, Michigan, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984) 10

Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) 17, 18, 19, 20, 21, 22

Ryan v. City of Shawnee, 13 F.3d 345 (10th Cir. 1993) 10

Thurston Motor Lines Inc. v. Jordan K. Rand Ltd., 460 U.S. 534 (1983) 14

Tran v. Tran, 54 F.3d 115 (2d Cir. 1995) 10

Contents

	Page
Weaver v. Minnesota Valley Laboratories, 470 N.W. 2d 131 (Minn. App. 1991)	22

Statutes Cited:

42 U.S.C. § 1983	11
42 U.S.C. § 2000e-2000e-17	1
42 U.S.C. § 2000e-2	7
42 U.S.C. § 2000e-5(b)	10
42 U.S.C. § 2000e-5(c)	7
42 U.S.C. § 2000e-5(d)	7
42 U.S.C. § 2000e-5(e)	7, 10
42 U.S.C. § 2000e-5(f)	10
Mo. Rev. Stat. §§ 213.010-137	1

Other Authorities Cited:

H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990) (*reprinted in* 1990 U.S.C.C.A.N. 565)	8
H.R. Rep. No. 40(I) 102d Cong. 1st Sess. 97 (*reprinted in* 1991 U.S.C.C.A.N. 549)	8, 9

Contents

Page

APPENDIX

Appendix A — Relevant Statutes 1a

Appendix B — Jury Instruction 4a

STATEMENT OF THE CASE

A. Procedural Background

Respondent Lisa Anne Varner ("Varner") claimed and the jury found that her then employer, Petitioner National Super Markets, Inc. ("National"), is liable to Varner under the Missouri Human Rights Act, Mo. Rev. Stat. §§ 213.010-137 (1994) (Count II of the Petition), and the Civil Rights Acts of 1964 and 1991, 42 U.S.C. §§ 2000e-2000e-17 (1994) (Count III of the Petition), for sexual harassment of Varner by a co-employee, Robert Paul Edmiston ("Edmiston"). The jury awarded Varner $30,000.00 in actual damages. (Petitioner's Appendix (hereinafter referred to as "Pet. App." 26a-27a). The district court entered judgment on the verdict on June 23, 1995, and on August 23, 1995, denied National's Motion for Judgment as a Matter of Law Pursuant to Rule 50 of the Federal Rules of Civil Procedure. (Pet. App. 26a-27a). The Eighth Circuit Court of Appeals affirmed the judgment of the trial court on September 9, 1996. (Pet. App. 1a-11a).

STATEMENT OF THE FACTS

A. Reports of Harassment

For this Court's consideration of whether it should issue a writ of certiorari, the details of the harassing acts themselves are not relevant. Varner's testimony concerning the nature of the four sexual comments and gestures made to her, and the nature of the two instances of offensive touching by Edmiston in late July, 1991, and on November 22, 1991, were uncontradicted at trial. Additionally, National did not dispute at trial that Varner contacted Christopher Pilch ("Pilch"), her boyfriend and co-employee at National, and advised him of each of the physical touching incidents immediately upon arriving home after work. Upon concluding his discussions with Varner

on both occasions Pilch telephoned Curtis Mason, the Store Manager at the Sierra Vista store where Varner, Edmiston and Pilch were employed, and reported the incidents involving Varner and Edmiston.

Rather, the factual disputes at trial centered upon the content of Pilch's report to Mason concerning the late July incident and Mason's responses to both reports. Pilch testified he told Mason of a physical touching. Mason testified, however, that Pilch had "merely" reported an "off-color remark." Pilch testified that Mason responded on both occasions that Varner "had to report the incidents to him and he could possibly say something to Edmiston and the condition could get worse or he could just let it alone and maybe Edmiston would forget about it." Mason testified he responded to both of Pilch's reports by advising Pilch to inform Varner to report to Roger Beckman in Human Resources.

It is further undisputed that Mason did not discuss the claims with Varner, did not confront Edmiston at any time, or inform anyone of Pilch's telephone calls until after Edmiston's arrest. It is undisputed that Varner did not personally talk to Roger Beckman or anyone else in National's upper management, nor did she file a grievance with the union. However, Varner did file charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Missouri Commission on Human Rights and such charges were served upon National.

Thus, National's repeated assertions in its Petition for Writ of Certiorari that Varner "chose" not to inform National of Edmiston's ongoing alleged harassment (pp. 2, 3 and 9, 25, 27 and 28), is misleading, and takes Varner's testimony out of context.

B. The Collective Bargaining Agreements

It is undisputed that during the time period in which the sexual harassment of Varner occurred, there was a Collective Bargaining Agreement ("CBA") in effect between National and United Food and Commercial Workers Local 655 ("Local 655"). The first CBA was in effect from June 19, 1988 through June 15, 1991, and the second CBA was in effect from June 16, 1991 through June 11, 1994. Portions of these CBA's are reprinted in the Appendix to the Petition for Writ of Certiorari. (Pet. App. 28a-57a). Varner became a member of the Local 655 and subject to the terms of the collective bargaining agreement thirty-one days after her date of hire because of the closed shop provisions of the collective bargaining agreement itself.

National quoted from portions of the CBAs in its Statement of the Case and those portions will not be recited again. Additional references to portions of National's CBAs will be discussed in connection with Varner's arguments for denial of the writ.

With regard to the trial testimony concerning the CBAs, Varner points out the following perceived omissions from National's statement of the case. The testimony of the shop stewards concerning the grievance and arbitration of sexual harassment claims was not as clear on the subject as National suggests. For example, Carol Wiessler, a shop steward testified on direct examination that as a shop steward, "sexual discrimination was an issue in which she could become involved." Nevertheless, on redirect examination, Wiessler was unable to state that discrimination claims were subject to the CBA until National's counsel lead her to that conclusion.

Further, the rank and file employees who testified on the subject disavowed knowledge that such claims were subject to

the CBA. Rather, as witness Patrick McCorkle testified, he never read the CBA, perhaps flipped through it and may have discussed the CBA with other employees on the topic of "maybe pay more than anything." Similarly, Pilch testified he had grieved a wage dispute under the CBAs. Varner was not asked questions concerning the specific contents of the CBAs.

C. The Sexual Harassment Policy

It is undisputed that during the occurrences National had a sexual harassment policy. (Pet. App. 67a-70a). The version (reissued 1/1/91) in effect during the relevant time period consisted of two sections. The first section outlined the prohibition against sexual harassment and required an employee who believed that he or she had been sexually harassed to promptly report the incident to Carol Schone of the Training Department or Roger Beckman of Human Resources. (Pet. App. 67a-70a). The first section of the policy contained the instruction "Please Post." The second section of the policy outlined the procedures for handling complaints. (Pet. App. 69a-70a). Under these procedures, a supervisor who is notified of a complaint regarding sexual harassment was to immediately direct the complainant to Carol Schone or Roger Beckman. (Pet. App. 69a). The January 1, 1991, version of the procedures contained the instruction "Do NOT Post." (Pet. App. 69a).

Mason testified at trial that under the procedures, he, as a store manager, could not take any action upon receipt of a complaint of sexual harassment. National's Director of Human Resources and Labor Relations who drafted the policy testified that he "did not want his managers going and investigating complaints that may be made."

Despite the "posting instructions" contained on the policy, there was a dispute in the evidence as to whether National's

sexual harassment policy was posted, and if posted, whether it was placed in a binder along with numerous policies or placed on a bulletin board along with OSHA policies, wedding invitations, "thank you" notes and union information.

The trial testimony revealed that National never sponsored meetings or seminars concerning sexual harassment for the nonsupervisory employees. According to Mason, he and the store managers had attended a seminar in which the issue of sexual harassment was one of several topics discussed, but he never held employee meetings concerning the sexual harassment policy or sexual harassment in general.

It is not disputed, that at the time she was hired, Varner was given an Employee Handbook. (Pet. App. 58a-61a). When shown the handbook at trial, Varner agreed the version of the Employee Handbook given to her contained a reference to National's sexual harassment policy.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT ISSUE THIS WRIT BECAUSE ANY DECISION ON THE FEDERAL LAW QUESTIONS WILL HAVE NO IMPACT ON THE JUDGMENT OF THE DISTRICT COURT, AND THIS COURT HAS RECENTLY DECLINED TO ENTERTAIN THE SAME ISSUES RAISED BY NATIONAL IN ANOTHER PETITION.

The jury's verdict and the judgment of the district court were in favor of Varner on her claims under both the Missouri Human Rights Act and the Federal Civil Rights Act. The Eighth Circuit Court of Appeals affirmed the judgment as to both claims.

However, in its Petition for Writ of Certiorari, National confined the Questions Presented and its analysis of those questions to issues exclusively under federal law. Consequently, even if this Court were to grant certiorari and resolve the issues raised by National in its favor, the Court's opinion would not have any effect on the verdict for Varner under the Missouri Human Rights Act. Moreover, the arguments raised by National under the federal statutes and presented here for review, would find no favor with respect to the Missouri Human Rights Act. *See, e.g. Green v. City of St. Louis*, 870 S.W. 2d 794, 796 (Mo. banc 1994) (Exhaustion of other available administrative remedies is not required before filing suit under the Missouri Human Rights Act).

The Court's opinion as to the federal issues in essence would be merely advisory as they would not be altering the ultimate outcome in this case. For this reason, the Petition for Writ of Certiorari should be denied.

Moreover, this Court was recently presented with the occasion to take Certiorari on this precise issue in the case of *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) Docket No. 96-337, filed August 28, 1996. The opinion of the Eighth Circuit Court of Appeals in this case was brought to the attention of the Court in the Brief of Respondent filed in *Austin*. The Court denied certiorari in that case and should do so in this case.

II.

THE LANGUAGE AND HISTORY OF THE CIVIL RIGHTS ACTS OF 1964 (AS AMENDED) AND 1991 DO NOT MANDATE EXHAUSTION OF EITHER THE GRIEVANCE AND ARBITRATION PROCEDURES OF A COLLECTIVE BARGAINING AGREEMENT OR AN EMPLOYER'S INTERNAL GRIEVANCE PROCEDURE.

This Court should deny certiorari as to both questions presented by National because the Civil Rights Acts do not mandate the exhaustion of grievance and arbitration procedures of collective bargaining agreements nor the procedures of an employer's sexual harassment policy as a prerequisite to filing a lawsuit in federal court. The only express prerequisites to filing a civil suit under Title VII are the filing of a charge of discrimination with the EEOC and receipt of a notice of right to sue. 42 U.S.C. §§ 2000e-5(c), (d) and (e).

National relies in part on § 118 of the Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-2 (1994), Pub L. 102-166, 105 Stat. 1071, in support of its argument that this Court should grant certiorari. (Petition for Writ of Certiorari at 14-15). Section 118 of the Civil Rights Act of 1991, even when given the most liberal construction, does not mandate exhaustion of grievance and arbitration procedures under a CBA or an employer's sexual harassment policy.

In addition, the House Committee on Education and Labor, when passing upon the bill which became the 1991 Civil Rights Act, emphasized:

> the use of alternative dispute resolution is intended to *supplement, not supplant*, the remedies provided by Title VII. Thus, for

> example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.

H.R. Rep. No. 40 (I) 102d Cong. 1st Sess. 97 (*reprinted in* 1991 U.S.C.C.A.N. 549, 635 (emphasis added)).

Earlier House Committee Reports concerning § 118 also recognized the "voluntary" use of alternative dispute mechanisms. H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990) (*reprinted* in 1990 U.S.C.C.A.N. 565, 598).

The House Committee position recited above is echoed in its position on the exhaustion of internal employer grievance procedures. The Committee rejected the "Republican substitute" which would have required exhaustion of an employer's grievance procedure. In explaining its rationale for rejecting an amendment to the civil rights act, the committee stated,

> for the first time under Title VII the availability of a remedy would be conditional on a victim filing a complaint with his or her employer in addition to filing a complaint with a neutral, administrative enforcement agency. If a harassment victim failed to comply with every technicality of an employer's complaint procedure, the Republican substitute provided that "no unlawful employment practice shall be found to have occurred." That rule would apply *even if* a court finds undisputed evidence or

> egregious harassment and concludes that using the employer's complaint procedure would be futile. Moreover, the Republican substitute's vague wording would permit a court to bar a harassment victim's Title VII claim if he or she had not used the employer's internal complaint mechanism within ninety days of the harassment. Such a rule would in effect punish the victim . . .

H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 103 (1991) (*reprinted in* 1991 U.S.C.C.A.N. 549, 641).

Thus, the Questions Presented by National have been considered by Congress and plainly rejected. Accordingly, this Court should deny certiorari for the language and history of this legislation does not support the position of National.

III.

TWENTY YEARS OF SUPREME COURT PRECEDENT HOLDS THAT A CLAIMANT IS NOT REQUIRED TO GRIEVE AND ARBITRATE HER TITLE VII CLAIM PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT.

The Court should deny certiorari as to Petitioner's question concerning the exhaustion of collective bargaining remedies because this Court has previously resolved the issue in *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). Justice Powell delivered a unanimous opinion of the Court in *Gardner-Denver*, and pointed out that "final responsibility for enforcement of Title VII is vested with federal courts." 415 U.S. at 44, 94 S. Ct. at 1018. The Court further stated that Congress had specified "with precision the

jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when Petitioner (1) filed a timely charge of employment discrimination with the Commission, and (2) received and acted upon the Commissioner's statutory notice of the right to sue." (citing 42 U.S.C. §§ 2000e-5(b),(e) and (f) (further cites omitted)) 415 U.S. at 47, 94 S. Ct. at 1019. The express holding of the Supreme Court in *Alexander v. Gardner-Denver Company*, is that a claimant is not foreclosed from instituting a lawsuit in federal court under Title VII by reason of prior submission of his claim to final arbitration. 415 U.S. at 49, 59 and 60, 94 S. Ct. at 1020, 1024 and 1025.

The continued vitality of *Gardner-Denver* is recognized in *Livadas v. Bradshaw*, __ U.S. __, 114 S. Ct. 2068 (1994); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984); *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981).

National attempts to distinguish *Gardner-Denver* from the instant case on the grounds that in *Gardner-Denver* the claimant had exhausted the arbitration procedures under the CBA, whereas in this case Varner did not file a grievance or submit to arbitration. This factual distinction is without merit: Since *Gardner-Denver*, various Courts of Appeals have interpreted *Gardner-Denver* to extend to cover the situation at issue in this case, that is, failure to exhaust grievance and arbitration procedures of a CBA does not preclude the institution of a lawsuit under federal statutes. *See Tran v. Tran*, 54 F.3d 115, 116, n. 2 117 (2d Cir. 1995); *Ryan v. City of Shawnee*, 13 F.3d 345, 347 (10th Cir. 1993); *EEOC v. Board of Governors*, 957 F.2d 424, 431 (7th Cir. 1992).

Moreover, the Supreme Court implicitly recognized that *Gardner-Denver* could be extended to the situation in which a claimant had not arbitrated the issue. In *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, the Court stated: "The Court on numerous occasions, declined to hold that individual employees are, *because of the availability of arbitration*, barred from bringing claims under federal statutes" 480 U.S. 557, 565, 107 S. Ct. 1410, 1415, 94 L. Ed. 2d 563 (1987) (citing *Barrentine and Gardner-Denver*) (emphasis added). The Court noted that there was a collective bargaining agreement between the railroad and the employee's union and that such agreement included an arbitration provision. This Court then concluded that the claimant was not precluded from bringing his FELA claim by reason of the Railway Labor Act.

Likewise, in *Livadas v. Bradshaw*, __ U.S. __, 114 S. Ct. 2068 (1994), the Court appeared to accept the extension of *Gardner-Denver* to situations in which the claimant had failed to file a grievance concerning statutory rights. In *Livadas*, the claimant had not filed a grievance under the collective bargaining agreement concerning the state wage statute at issue in the case. Yet, after considerable discussion, including a reference to *Gardner-Denver*, this Court concluded the plaintiff could proceed with her claim under 42 U.S.C. § 1983. 114 S. Ct. at 2080 n.21.

In conclusion, both Supreme Court and Court of Appeals precedent has established that a claimant is not foreclosed from pursuing federal statutory claims in federal court despite the existence of a grievance and arbitration procedure in a collective bargaining agreement. Certiorari would be inappropriate in this case because the matter has been well settled by the courts and this case presents no new issue for determination by this Court.

IV.

NATIONAL'S ALLEGED CONFLICT BETWEEN THE EIGHTH AND THE FOURTH CIRCUIT IS NONEXISTENT BECAUSE THE *AUSTIN* DECISION ERRONEOUSLY APPLIED SUPREME COURT PRECEDENT AND BECAUSE THERE ARE SIGNIFICANT FACTUAL DIFFERENCES BETWEEN THE COLLECTIVE BARGAINING AGREEMENTS AT ISSUE IN EACH CASE WHICH SUPPORT THE CONCLUSIONS REACHED BY THE RESPECTIVE COURTS.

There is no conflict between the decision in *Austin v. Owens-Brockway Glass Container Corp.*, 78 F.3d 875 (4th Cir. 1996), and the decision by the Eighth Circuit because the Fourth Circuit erred by issuing a decision contrary to Supreme Court precedent and such a decision should not be viewed as creating a conflict justifying certiorari.

In relying upon *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), the Fourth Circuit held in *Austin* that the plaintiff's failure to submit her claims to mandatory arbitration as required under the collective bargaining agreement, barred her from pursuing claims under Title VII and the Americans With Disabilities Act. This Court in *Gilmer* held that private, individual agreements to arbitrate all employment related claims could be enforced to include actions under the Age Discrimination in Employment Act. However, the Fourth Circuit ignored the crucial distinction the Court in *Gilmer* drew between private individual agreements and collective bargaining agreements. Quoting from *Gardner-Denver*, this Court in *Gilmer* stated:

> [I]n submitting his grievance to arbitration,

> an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.

Gilmer, 500 U.S. at 34, 111 S. Ct. at 1565. (citing *Alexander v. Gardner-Denver*, 415 U.S. at 49-50, 94 S. Ct. at 1020).

The Court in *Gilmer* continued: "[W]e further expressed concern that in collective-bargaining arbitration the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Gilmer*, 500 U.S. at 34, 111 S. Ct. at 1656 (citing *Gardner-Denver*, 415 U.S. at 58, n. 19, 94 S. Ct. at 1024, n. 19).

The Court in *Gilmer* then explained that in *Gardner-Denver* and its progeny, "[a]n important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case." 500 U.S. at 35, 111 S. Ct. at 1657. The Fourth Circuit ignored the Supreme Court's distinction in *Gilmer*, between collective bargaining and individual statutory rights and consequently misapplied *Gilmer*.

In addition, the Fourth Circuit misinterpreted § 118 of the Civil Rights Act of 1991 as evidencing congressional intent to mandate arbitration, by ignoring the fact that Congress in § 118 merely "encouraged" arbitration. The Fourth Circuit made reference to the House Committee Conference Reports but dismissed them as "unclear". The Fourth Circuit also ignored

the fact that Congress did not change or amend the enforcement provisions or the prerequisites for federal suit set forth in 42 U.S.C. § 2000e-5 (1994) to include exhaustion of remedies under a CBA.

Because the Fourth Circuit in *Austin* erred in issuing a ruling contrary to Supreme Court precedent, any purported conflict engendered by such a decision can be disregarded, for only the Supreme Court may overrule one of its precedents. *See Thurston Motor Lines Inc. v. Jordan K. Rand Ltd.*, 460 U.S. 534, 535 (1983). Accordingly, certiorari should be denied for there is no conflict between the circuits on the issue.

Furthermore, there are significant distinctions between the *Austin* collective bargaining agreement and those at issue in this case. The *Austin* collective bargaining agreement contained "Article 38" which was expressly entitled "Fair Employment Practice and Equal Opportunities." Article 38 states:

> 1. The Company and the Union *will comply with all laws preventing discrimination* against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status.
>
> 2. *This Contract shall be administered in accordance with the applicable provisions of the Americans with Disabilities Act. Before taking action relative to this Section*, the Company will meet with the Local Union, and both parties will have sufficient opportunity to express their opinions regarding an anticipated action.
>
> 3. *Any disputes under this Article as with*

> *all other Articles of this Contract shall be subject to the grievance procedure.*

(Emphasis added). *Austin*, 78 F.3d at 879-880.

In contrast, Article 2 of the CBA between National and Local 655 does not contain similar express language mandating use of the grievance procedure for discrimination claims. Although Section 2.5 entitled "Union Security", reflects the agreement between Local 655 and National that there shall be no discrimination on the basis of sex and contains the phrase "in accordance with existing law", it does not contain any reference to the grievance and arbitration procedure, or make specific reference to Title VII, the Americans with Disabilities Act or other anti-discrimination laws. Moreover, the "existing law at the time of National's first relevant CBA included this Court's decision in *Gardner-Denver.* At the time of the second relevant CBA, the "existing law" included the 1991 Civil Rights Act, merely "encouraging" alternative means of dispute resolution and this Court's opinion in *Gilmer* reaffirming *Gardner-Denver*. Unlike Article 38, Section 2.5 is not set out in a separate article or entitled in such a fashion as to indicate it intends to discuss equal opportunities. In fact, Section 2.5 is buried among other provisions in Article 2 concerning such matters as union membership, the wearing of union buttons and the like. A reasonable construction of the Union Security provision is what it says: the employer agrees not to interfere with the Union and the rights of the employees to collectively organize. Thus, Article 2 and particularly Section 2.5, does not put union members on notice that their Title VII claims are subject to collective bargaining agreement remedies.

Article 3 of each of National's CBAs is entitled "management rights". The obvious focus of Article 3 is the power

of management to plan, direct and control store operations without union interference. Although Article 3, unlike Section 2.5, references the grievance procedure, Article 3 similarly fails to notify union members that their Title VII claims are subject to the grievance and arbitration procedure.

None of the other sections of National's collective bargaining agreement cited by National in its Petition for Writ of Certiorari expressly reference the "laws preventing discrimination", or indicate that statutory claims are subject to the grievance and arbitration procedures. Furthermore, Section 4.3 of National's collective bargaining agreements provided that the arbitrator "shall not be empowered to add to, detract from or alter the terms of this agreement." (Pet. App. 39a, 55a). As the Court in *Gardner-Denver* stated:

> Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement.

Gardner-Denver, 415 U.S. at 56-57, 94 S. Ct. 1011 at 1024. Section 4.3 expressly limits the arbitrator to the terms of the contract, thus, the arbitrator does not have the authority to resolve statutory claims because the specific provisions of Title VII and other antidiscrimination laws were not made part of the collective bargaining agreements. The contrary argument could be made with respect to Article 38 of the *Austin* collective bargaining agreement and the Fourth Circuit so held.

Therefore, the only "conflict" between *Austin* and the instant case is a factual conflict upon which the different outcomes can be explained. For this additional reason, certiorari is not appropriate in this case.

V.

THIS COURT NEED NOT CLARIFY ITS DECISION IN *MERITOR V. VINSON* AS NATIONAL WAS ALLOWED TO INTRODUCE EVIDENCE AND ARGUE ITS POSITION AT THE TRIAL COURT, AND NATIONAL'S PETITION MERELY RAISES A SUFFICIENCY OF THE EVIDENCE ARGUMENT.

National seeks this Court to reconsider its decision in *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). In *Meritor*, this Court declined to specify the precise contents of an employer's anti-discrimination policy that would shield the employer from liability. Instead the Court instructed the lower courts to look to agency principles when deciding employer liability. The Court's implicit rationale in doing so was to avoid drawing bright line rules which could result in unfairness to either the employer or the employee, and to provide flexibility to the courts in resolving the issue by reference to the well established common law. Thus, in *Meritor*, the Court expressly rejected the Court of Appeal's bright line declaration that an employer is automatically liable for sexual harassment practiced by its supervisors. 477 U.S. at 72, 106 S. Ct. at 2408. Likewise the court rejected the notion that a grievance procedure will automatically shield the employer from liability. *Id.* Specifically, the Supreme Court in *Meritor* stated with regard to the existence of a grievance procedure and a policy against discrimination, coupled with the failure of the claimant to invoke that procedure:

> [W]hile those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive.

Meritor, 477 U.S. at 72, 106 S. Ct. at 2408. The Court then held, based on the facts of that case, that Meritor Savings Bank's procedure was ineffective because it required reporting to the supervisor, who was the harasser. *Id.*

Meritor provides ample guidance to the lower courts to use the familiar principles of agency when deciding employer liability. As to when a sexual harassment policy is sufficient to shield an employer from liability, the Court in *Meritor* indicates that such analysis is a fact dependent inquiry.

Meritor clearly provided sufficient guidance to the district court in this case. National presented to the jury substantial evidence concerning the effectiveness of its sexual harassment policy. Moreover, at National's request, and over the objection of Varner, the trial court instructed the jury as follows:

> Defendant National Super Markets, Inc. is not liable to Plaintiff, if you believe:
>
> > First, defendant had a written sexual harassment policy; and
> >
> > Second, the sexual harassment policy was calculated to encourage employees subjected to sexual harassment to follow its provisions;
> >
> > Third, Plaintiff Lisa Varner failed to follow its provisions.

(Resp. App. 4a).

The instruction was based on the language of *Meritor*. Thus, National was able to present evidence and argue to the jury its position based on *Meritor*. Although National now may find the jury's determination, that National's sexual harassment policy was ineffective to absolve it of liability, unacceptable, such is not a reason to justify the grant of certiorari in this case.

In essence, National is asking this Court to find that the jury's verdict is erroneous because in National's opinion it is against the weight of the evidence. However, National never made the challenge below and should not be able to do so here. Therefore, this Court should deny certiorari on this issue.

VI.

NATIONAL SUGGESTS THERE IS A CONFLICT BETWEEN THE EIGHTH CIRCUIT'S OPINION IN THIS CASE AND THE THIRD CIRCUIT'S OPINION IN *BOUTON V. BMW OF NORTH AMERICA, INC.*; HOWEVER, THE ONLY "CONFLICT" IS THE OUTCOME IN EACH CASE WHICH IS DUE TO THE DIFFERENCES IN THE FACTS OF EACH CASE.

Review of the Third Circuit's decision in *Bouton v. BMW of North America, Inc.*, 29 F.3d 103 (3rd Cir. 1994), reveals that it is not in conflict with the Eighth Circuit's opinion in this case. Rather, the conclusion that the employer is not liable in *Bouton* was predicated upon the specific facts of that case which are distinguishable from the facts in this case.

In *Bouton*, the facts revealed Bouton knew of the employer's sexual harassment policy, that the policy was well advertised, and that she had used it effectively in the past. 29 F.3d at 109-110. In this case, there was a factual dispute as to whether Varner knew of the specific reporting procedures of National's sexual

harassment policy, whether Varner had seen it or read it until her deposition, whether the policy was posted and, if so, how it was posted. Moreover, there was no evidence Varner had ever used the policy before. In *Bouton*, the evidence showed the employer took prompt remedial action in response to Bouton's first complaint of sexual harassment by granting her request for a transfer even though it found her complaint uncorroborated. 29 F.3d at 107-108. In this case, sufficient evidence showed that no action was taken in response to Pilch's complaint of sexual harassment of Varner to Mason.

Thus, the different results in each case were due to the different facts in each case. Consequently, there is no conflict between the circuits justifying certiorari.

VII.

NATIONAL SUGGESTS THAT VARIOUS COURTS HAVE INTERPRETED *MERITOR* DIFFERENTLY AND THEREFORE, THIS COURT SHOULD CLARIFY THE HOLDING IN *MERITOR*; HOWEVER, REVIEW OF EACH OF THE CASES CITED BY NATIONAL REVEALS THAT THE COURTS DID NOT INTERPRET *MERITOR* DIFFERENTLY BUT RATHER THE OUTCOME DIFFERED BECAUSE OF THE APPLICATION OF *MERITOR* TO THE SPECIFIC FACTS OF EACH CASE.

A review of the cases cited by National indicate no legal variance in the interpretation of the *Meritor* decision. In *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995)[1], the court concluded that the employer was not liable for the sexual harassment of

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1. There is a typographical error in the citation to *Gary v. Long* contained in the Petition for Writ of Certiorari at p. vii and 28. The correct cite is set forth herein.

Gary by her supervisor because its sexual harassment policy was effective. The basis for the court's conclusion was that the employer had a sexual harassment policy that was well publicized, that Gary had conceded at oral argument that the employer's sexual harassment policy was adequate, and that the evidence showed prompt remedial action was taken in connection with Gary's complaint. 59 F.3d at 1398 and 1399. Thus, *Gary* is consistent with *Meritor*'s suggestion that an effective sexual harassment policy can shield an employer from liability. The different resolution between *Meritor* and *Gary* was due to the distinction between the facts of the two cases.

In *Jansen v. Packaging Company of America*, 895 F. Supp. 1053 (N.D. Ill. 1995), the court granted summary judgment in favor of the employer because, although it found that the employer had constructive knowledge of the sexual harassment, the employer took reasonable and effective measures in response to the claimed sexual harassment. 895 F. Supp at 1064-1065. The court referred to Jansen's deposition testimony in which Jansen testified that she had not reported the supervisor's conduct earlier because she thought he would back off, but when she was pushed to the limits she just walked out and went to personnel. The court concluded on the basis of this testimony that Jansen "plainly knew she had some recourse at Packaging." 895 F.Supp at 1067. The court declined to consider the issue further because it found Jansen knew her supervisor had limited authority over her and that he did not have apparent authority to harass her. *Id.* at 1067. Thus, *Jansen* is likewise factually distinguishable from *Meritor* and such factual differences explain the difference in the outcome of the two cases.

The Ninth Circuit Court of Appeals rejected an argument of an employer that its nondiscrimination policy should shield it from liability in *Equal Opportunity Commission v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989). In so doing, the court

relied on *Meritor*'s statement that the "mere existence of a grievance procedure and a policy against discrimination coupled with [an employee's] failure to invoke the procedure" does not necessarily insulate the employer from liability. 881 F.2d at 1516 (citing 477 U.S. at 72, 96 S. Ct. at 2408.) The court found Hacienda Hotel's nondiscrimination policy ineffective for the same reasons the Court in *Meritor* found the bank's policy to be ineffective. Both were general nondiscrimination policies and both required initial reporting to a supervisor who in both cases engaged in or condoned the harassment. *Id.*

Finally, in *Weaver v. Minnesota Valley Laboratories*, 470 N.W. 2d 131 (Minn. App. 1991), the Court rejected the claim the employee quit due to sexual harassment because it found under the facts of the case that the employer did not know nor should it have known of the sexual harassment. There, the facts revealed that no complaints amounting to sexual harassment were made by the claimant, or by anyone on his behalf, and the employee knew to whom he was to report such matters under the company policy for he had reported other matters to that individual. Thus, *Weaver* is likewise distinguishable from the facts in *Meritor*, for in *Meritor*, even though Vinson may have known to whom to report, the person to whom she was to report was the harasser, thus, the policy was not effective under that scenario.

In conclusion, this case is not appropriate for certiorari. Under *Meritor, Bouton, Gary, Hacienda Hotel, Jansen and Weaver*, the effectiveness of the sexual harassment policy involves consideration of all the facts in the case and the application of agency law to these facts. The fact finders in this case, after the presentation of voluminous evidence concerning the policy, found that National's sexual harassment policy was not reasonably calculated to encourage victims of discrimination to come forward. The Eighth Circuit affirmed that finding. Had

National been foreclosed from presenting evidence regarding the policy perhaps their Petition for Certiorari would be more compelling, but such is not the case. Therefore, certiorari should be denied.

CONCLUSION

For the reasons stated more fully herein, National Super Market, Inc.'s Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — RELEVANT STATUTES

Missouri Human Rights Act, Rev. Stat. Mo. §§ 213.055.1 and 213.111 (1994).

§ 213.055 Unlawful employment practices.

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or handicap of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap;

(b) To limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap;

* * *

Appendix A

§ 213.111 Right to civil action, when — relief available — costs and attorneys' fees, awarded when

1. If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice, the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his[1] right to bring a civil action within ninety days of such notice against the respondent named in the complaint. Such an action may be brought in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred, either before a circuit or associate circuit judge. Upon issuance of this notice, the commission shall terminate all proceedings relating to the complaint. No person may file or reinstate a complaint with the commission after the issuance of a notice under this section relating to the same practice or act. Any action brought in court under this section shall be filed within ninety days from the date of the commission's notification letter to the individual but no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party.

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1. Revisor's note: Work "their" appears in original rolls.

Appendix A

2. The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award court costs and reasonable attorney fees to the prevailing party, other than a state agency or commission or a local commission; except that, a prevailing respondent may be awarded court costs and reasonable attorney fees only upon a showing that the case is without foundation.

APPENDIX B — JURY INSTRUCTION

INSTRUCTION NO. 11

Defendant National Super Markets, Inc., is not liable to Plaintiff, if you believe:

First, defendant had a written Sexual Harassment Policy; and

Second, the Sexual Harassment Policy was calculated to encourage employees subjected to sexual harassment to follow its provisions, and;

Third, Plaintiff Lisa Anne Varner failed to follow its provisions.